IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
MARK D. MAZZA	:	**No. 98-113-01**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **February 4, 2002**

Defendant, Mark Mazza, was charged with bank fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1344 and 2 (Indictment, Counts One and Four) and sending by United States mail a threat to injure the reputation of another person, in violation of 18 U.S.C. § 876 (Indictment, Count Four). A jury convicted him on those counts; he was acquitted of mailing a threat to injure the person of another, in violation of 18 U.S.C. § 876 (Indictment, Count Two).

His conviction resulted from theft of $60,000 from the account of Mazza's estranged wife, accomplished by persuading a bank officer to give him a counter check on the account, making and cashing a $60,000 check, payable to his brother, Thomas, then forging his wife's name. Mazza was sentenced to concurrent sentences of 18 months imprisonment and 18 months supervised release, fined $4,000, and required to pay a special assessment of $150.00.

Now before the court is Mark Mazza's Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody.

1. **Ineffective Assistance of Counsel.**

Defendant claims that his counsel, Thomas C. Carroll, Esq., was ineffective because he misread the report of the psychiatrist who examined defendant's mental condition and erroneously requested a downward departure for diminished capacity but not aberrant behavior.

As stated by the government in its Response, p. 5:

> "These allegations bear no relation to what is depicted in the record. In truth, defense counsel Carroll aggressively sought a downward departure for diminished capacity, and never relented. He presented both written and testimonial evidence supporting the proposition that Mark Mazza was emotionally disturbed from the moment his wife left him on February 2, 1994, allegedly precipitating the criminal conduct.
>
> The report of Dr. Richard Frederick Limoges, dated February 28, 2000, was attached as Exhibit C to the defendant's sentencing submission to the court. . . . Dr. Limoges addressed at length Mazza's claim of emotional distress as a result of the marital separation which precipitated his criminal conduct, and concluded that at that time and through the time of sentencing Mazza's emotional condition 'caused him to think and reason in such a fashion as to be unable to fully appreciate the range of choices he has in problem solving and to affect his ability to appreciate the nature and consequences of the choices he makes.' (letter at 5).
>
> The sentencing submission also included the February 18, 2000 report of psychologist

> Victor J. Malatesta, Ph.D., who similarly concluded that Mazza's '1994 history is strongly suggestive of a [post-traumatic stress syndrome]-like and/or dissociative response to what he perceived as a traumatic stressor. (letter at 6).
>
> At the sentencing hearing, counsel presented Dr. Limoges' testimony in support of a request for a downward departure based on diminished capacity. . . . "

The request for a downward departure based on diminished capacity was never withdrawn. The court ruled:

> "I've considered this seriously. I believe that it is extremely likely that Mr. Mazza is suffering from depression. I don't have a defendant come before me for sentencing who isn't. It's a depressing thing, because for the first time sometimes defendants learn that conduct has consequences.
>
> However, as much as I respect Dr. Limoges, his information in my view was inadequate and based essentially on Mark Mazza's account. And, Mark Mazza may have convinced himself that he did this out of love for Donna Reitelbach Mazza. But, having heard the testimony at trial, it seemed to me it was greed rather than love
>
> This is a monetary offense. It involved taking $60,000, not giving it back, engaging in concealment. And, the letter to Ms. MacElree was an intent to get money to pay for the marital residence. And, it just seems to me that there's no basis for a diminished capacity defense. So, I deny it."
>
> (Trans. 118-19).

Defendant had specifically asked for a downward departure based on aberrant behavior, but after the court's rejection of a downward departure for diminished capacity, it was withdrawn by counsel who no doubt realized it would not have been

granted. Defendant's conduct during the offense, pre-trial and trial, was too extensive to convince the court it was aberrant in any way. Mazza's counsel was effective at trial and at sentencing but advocacy has its limits; it cannot change the offense, conduct, or the Sentencing Guidelines.

2. **Newly Discovered Evidence.**

Mazza, in his 28 U.S.C. § 2255 petition, has now submitted another doctor's report, dated more than one year after the sentencing hearing, in which Dr. Paul J. Fink concludes that Mazza was "severely emotionally impaired after the actions of his wife leading to separation and divorce and this resulted in a series of misjudgments he made." (Motion for Relief, p. 5). This is substantially identical to the conclusions presented to the court a year earlier by Drs. Limoges and Malatesta. Indeed, Dr. Fink wrote, "In general, I agree with the diagnostic conclusions of these two professionals, who found him to be very depressed;" at no point in his report did Dr. Fink state any disagreement with Drs. Limoges and Malatesta about anything.

To the extent that Dr. Fink's report is based on circumstances prior to sentencing, it is not newly discovered evidence. His professional opinion was readily available prior to sentencing and would have been considered, if presented. To the extent his report is based on events after sentencing, it cannot demonstrate ineffective assistance of counsel before the

events on which his opinion is based had occurred. To suggest Dr. Fink's opinion would have affected defendant's sentence is frivolous. Had this report of Dr. Paul J. Fink or his testimony been presented at sentencing, the result would have been the same. The court has great respect for the professional competence of Dr. Fink as an analyst, but he obviously relies on the "facts" as recounted by his patient, as did Dr. Limoges. Dr. Fink relied on a false account, one that omitted material circumstances his patient failed to reveal. Had Dr. Fink read the trial transcript, it most probably would have added insights and modified his opinions. Having presided at trial, the court could not countenance defendant's continued inability to face the consequences of his actions. There was, and is, no basis for a downward departure for diminished capacity, aberrant behavior, or anything else. The sentence was at the low end of the Sentencing Guidelines and somewhat lenient in view of the nature of the offense and the character of the offender.

Finally, counsel argues that events subsequent to sentencing compel a modification of sentence. Defendant's father has died and it is argued that his mother is now home alone and is unable to care for herself. But even when his father was alive, it was argued that defendant was needed at home to take care of her; there is no reason to believe the unfortunate death of his father affected the care of his mother in any meaningful

way. His mother's mental deterioration is also most regrettable, but it was already known at time of trial and has not developed since or because of his incarceration. There are siblings available to care for Mrs. Mazza during the remainder of her son's imprisonment.

Defendant remarried after sentencing. His wife had a baby when Mazza was not in custody pending appeal, but had reason to believe he was facing incarceration; this cannot be a reason for modification. It would not have been a reason for downward departure at time of sentencing. Examination of Third Circuit appellate precedent on family circumstances as a ground for sentence reduction demonstrates that this contention is totally lacking in merit.

However, Dr. Fink's recommendation that the defendant should have individual outpatient psychotherapy is well taken; he clearly needs continued help in facing reality and accepting the consequences of his conduct. Community service would also be of value; unfortunately, his sentence did not include this as a condition of supervision. If defendant wishes to consent to such a modification, the Probation Office should recommend it on his release from custody.

Defendant's motion under 28 U.S.C. § 2255 for ineffective assistance of counsel[1] or "after discovered" or newly discovered evidence is **DENIED**. There is no possible cause to issue a Certificate of Appealability.

[1]Defense counsel seems unmindful that under Fed. R. Civ. Pro. 11, the sentencing judge is without jurisdiction to reduce a sentence after it has been imposed for any reason, except for a clerical error (for 10 days) or a constitutional error, such as ineffective assistance of counsel. Since the sole non-frivolous basis for defendant's motion to vacate sentence could only be alleged ineffective assistance of counsel, the court finds defendant's well-deserved tribute to the competence and diligence of trial counsel in his Answer (p. 7, f.n. 1), almost a confession of the lack of substance of this motion.

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ORDER

AND NOW, this day of February, 2002, upon consideration of defendant's Motion to Vacate Sentence under 28 U.S.C. § 2255, the Government's Response and defendant's Answer to the Government's Response, it is **ORDERED** that:

1. Defendant's Motion is **DENIED** and dismissed without an evidentiary hearing.

2. There is no probable cause to issue a Certificate of Appealability.

_____
S.J.